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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1416

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT UNITED AIRCRAFT CORPORATION IN OPPOSITION

QUESTION PRESENTED

Whether a Union, representing an employee disciplined for violating Company rules contained in a labor agreement, may avoid the grievance and arbitration procedure to which it has agreed in its contract by bringing the dispute before the National Labor Relations Board.

STATEMENT OF THE CASE

A. The Facts

The Company and the Union[1] have a collective bargaining agreement which provides (Art. IV, para. 3):

> "There shall be no solicitation of employees for union membership or dues conducted upon the premises of the company during working hours by the union, its representatives or by employees." (App. 8a)[2]

The contract also provides (Art. VII, § 1):

> "In the event that a difference arises between the company, the union or any employee concerning the interpretation, application or compliance with the provisions of this agreement, an earnest effort will be made to resolve such difference in accordance with the following procedure which must be followed." (App. 8a-9a).

The contract established a four-step grievance procedure which expressly permits an employee, the Company or the Union to initiate grievances. Grievances by the Company or the Union can be initiated at the third step. Cetrain grievances, including all those concerning the discharge or disciplinary suspension of an employee, if not resolved at the fourth step of the grievance procedure, may then be submitted to binding arbitration at the request of either the Company or the Union (App. 3a-4a, 8a-9a).

On December 30, 1969, the Company suspended shop steward Theodore Tobin for one day for violation of

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[1] Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO.

[2] All citations are to the Appendix to the petition for certiorari, unless otherwise indicated.

the Company rule against solicitation. Neither Tobin nor the Union filed a grievance but filed an unfair labor practice charge with the National Labor Relations Board alleging that Tobin's discharge was in violation of the National Labor Relations Act. (App. 4a, 8a).

The Company thereupon filed a grievance and asked for a resolution of the matter under the contract at the third step of the grievance procedure. The Union refused the Company's request for grievance discussions or arbitration. The Union took the position that the issuance of a complaint by the Board's General Counsel on its charge that the Company had violated the Act made the contract arbitration procedure unenforceable (App. 4a, 10a).[3]

The Company then instituted proceedings in the United States District Court under § 301 of the National Labor Relations Act to compel the Union to arbitrate.

B. The Court Proceedings Below

On the above facts, the District Court found that:

> ". . . the plaintiff has presented a grievance cognizable within the terms of the labor agreement; and the Union has a contractual duty to arbitrate the same." (App. 20a).

The District Court rejected the Union's contention that the pendency of proceedings before the National

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[3] The Trial Examiner and the Board subsequently found that the Company had committed an unfair labor practice by its conduct (App. 40a-52a; Appendix C, Brief of Petitioner).

Labor Relations Board made the agreement to arbitrate unenforceable. The Court pointed out:

> "The arbitration process will not preclude or otherwise limit the Union's right to simultaneously process its statutory grievance before the NLRB. It shall be the Board's prerogative, depending upon the facts and circumstances of the particular case, to exercise its discretion . . . if the facts warrant, to proceed forthwith to a prompt adjudication and enforcement consistent with its statutory responsibilities." (App. 16a-17a).

The Second Circuit Court of Appeals unanimously affirmed. "Only by a completely strained reading of the contract and a completely unrealistic definition of the dispute," said the Court, could it agree with the Union's contention that Tobin's suspension did not fall within the arbitration provisions of the contract. The Court of Appeals, as did the District Court, ruled simply that settled law required "arbitration where under any reasonable construction the contract would cover the grievance . . ." (App. 5a). The Court dismissed the Union's argument that the arbitrator had no authority once the Union resorted to the Board, and rejected the Union's contention that forcing it to proceed to arbitration "penalized" it for using the Board's process. As the Court of Appeals phrased it:

> "This argument is specious, for the [District] court had nothing to do with the execution of the collective bargaining agreement in which the Union undertook to arbitrate. Where there is such an agreement there is concurrent contract and Board jurisdiction." (App. 6a).

ARGUMENT

The Present Case Presents No Important Issue of Federal Law

The petition raises no issue deserving of review.

Rule 19 of the Rules of this Court sets forth the considerations which govern this Court's grant or denial of a petition for certiorari. Petitioner, in attempting to draw itself within the specific categories of controversies which the Court in Rule 19 has agreed to consider, alleges that the decision below "is inconsistent with the decisions of this Court, undermines the national labor policy, and multiplies litigation." (Pet. Br. 12). The latter consideration involving an allegation of multiple litigation, even if true, is not one of the categories under which one may seek review from this Court. Consequently, Petitioner's request for relief rests solely on its claim of conflicts between the decision below and other opinions of this Court and with a "national labor policy."

The petition constitutes a direct assault on two basic principles of labor relations law which are firmly embedded in the decisions of the Court. The one is the principle favoring arbitration of contract disputes. The other is the principle that the authority of the Board and the law of contract are "concurrent regimes, neither preempting the other." *NLRB* v. *Strong,* 393 U.S. 357, 360 (1969).

In demonstrating why the decision below does not involve questions meriting this Court's attention, it is important to note what the Court of Appeals *did not hold.*

Stripped of its elaborate sophistry, petitioner's whole contention comes down to the proposition that

once a party invokes the jurisdiction of the NLRB, the arbitrator's jurisdiction under the contract is ousted. As the court below said, neither a union nor an employer can resist contract arbitration because it prefers the NLRB as a forum. Where there is an agreement to arbitrate, jurisdiction is concurrent.

The court below in no way limited the right of the Union to pursue its remedies before the National Labor Relations Board. There has been no attempt to dictate to the Board what it should or should not do. The Court has left this entirely in the Board's hands. As the Court of Appeals made clear:

> "This case does not present as issues when or to what extent the Board should defer to an arbitrator's decision, nor does it present as an issue when the Board should postpone its own proceeding until the conclusion of contract arbitration .... It presents only the propriety of the district court's order enforcing an arbitration agreement at a time when a dispute arising out of the same facts is pending before the Board." (App. 6a-7a).

Petitioner has not otherwise defined the "national labor policy" it feels has been "undermined" by the Second Circuit Court of Appeals. Petitioner does advert, however, to two sections of the National Labor Relations Act, § 203(d) and § 10(a), which it contends the Court of Appeals misconstrued. But this allegation is without merit. Section 203(d), in fact, declares that:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

This section suggests, if it suggests anything which is pertinent here, that preference should be given to the arbitral process. The decision below is in total harmony with that Section of the Act.

Section 10(a) empowers the Board to prevent the commission of unfair labor practices. The opinion below, as noted above, in no way interferes with the Board's exercise of its statutory powers.

Despite Petitioner's protestations to the contrary, this case involves an unexceptional interpretation of the contract between these parties under Section 301 of the Act ruling in favor of the arbitrability of a particular dispute. The ruling is in complete harmony with, and in truth required by, the ruling of this Court in the Arbitration Trilogy[4] that:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-583.

This case presented the Court with the simple issue of whether the inclusive rule enunciated in the Arbitration Trilogy should be applied to the contract and grievance involved in this case. The Court ruled in favor of arbitrability. It could hardly have ruled otherwise since there is an express clause in the contract governing union solicitation during working hours, and the issue to be arbitrated was the applica-

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[4] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

tion of this clause to a particular case. This decision was in every respect faithful to the principles which the Court has established for determining the arbitrability of contract disputes.

Petitioner suggests that the underlying decision is in conflict with this Court's decision in *Wilko* v. *Swan,* 346 U.S. 427 (1953) and decisions of this Court requiring free access to Board processes (Pet. Br. p. 15). There is no such conflict. *Wilko* v. *Swan* dealt with the right of a brokerage house to stay a suit at law brought by a customer for misrepresentation on the ground that the customer, in the margin agreements, had agreed to arbitrate any dispute arising out of the transaction. The Securities Act had a provision, resembling nothing in the present litigation, specifically forbidding the waiver of any of its provisions by stipulation. This Court held that the customer's agreement to arbitrate was akin to a "stipulation" forbidden by the Act. (346 U.S. at 433-435.) There is no suit here to stay the processing of the Union's complaint before the NLRB. Petitioner, moreover, overlooks the fact that in *United Steelworkers* v. *Warrior & Gulf Nav. Co., supra,* this Court specifically found that the *Wilko* line of cases involving commercial arbitration as a substitute for litigation were "irrelevant" to the issue of arbitrability in labor-management disputes. The Court said:

> "Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here." 363 U.S. at 578.

Petitioner seeks to revive the *Wilko* rule and apply it to a labor arbitration on the bare assertion that

arbitration was not sought in this case as a substitute for industrial strife (Pet. Br. p. 15). Arbitration, where it is an agreed upon method of resolving industrial disputes, is always an available substitute for industrial strife, and recourse to the arbitration procedure has been strongly encouraged by the Court.

The Petitioner theorizes, however, that the "avowed purpose" of the Company's invocation of arbitration was to utilize it as a substitute for the NLRB proceedings. But it is not within the power of the employer here to oust the Board of jurisdiction. Whatever the subjective purpose of a party in seeking arbitration, the law is clear that resort to arbitration does not operate to oust the Board from jurisdiction or stay Board proceedings. *Carey* v. *Westinghouse Corp.,* 375 U.S. 261 (1964). That power rests exclusively with the Board. The present case is eloquent testimony to this rule. Despite the pendency of the arbitration case and the action of the courts below in ordering arbitration, the Board has continued to process the unfair labor practice case.

Petitioner's citation of cases such as *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967), *NLRB* v. *Marine Workers,* 391 U.S. 418 (1968), and *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432 (1967) (Pet. Br. p. 17-18) misses the mark. *Acme Industrial* involved the refusal of a lower Court to enforce a Board order until appellant had completed arbitration. *Nash* involved a state's refusal to grant unemployment benefits to an employee who had filed an unfair labor practice charge with the Board. *Marine Workers* concerned union penalties against a member who filed Board charges. Manifestly, none of these cases is in conflict with the decision here which holds that a party which

voluntarily agrees to arbitration must arbitrate an issue concerning the interpretation or application of his contract, whether or not such party concurrently invokes the process of the NLRB.

Petitioner also suggests that the decision below conflicts with the decision of the Fifth Circuit Court of Appeals in *Vulcan Materials Co.* v. *United Steelworkers,* 430 F.2d 446 (1970), (Pet. Br. p. 17). Petitioner again misreads the authority on which it relies. *Vulcan* dealt with a successful damage suit under § 303 of the National Labor Relations Act arising out of tortious secondary boycott conduct of the Union. The Court refused to order the Company to arbitrate the matter rather than pursue its statutory remedy under § 303, because the strong national labor policy favoring arbitration "concerning the interpretation or application of [collective bargaining] agreements" does not apply to a § 303 suit concerning damages, "matters to which the expertise of labor arbitrators does not necessarily extend." *Old Dutch Farms, Inc.* v. *Milk Drivers Union,* 359 F.2d 598, 602 (C.A. 2, 1966) (adopted by the Court in *Vulcan Materials*).[5] *Vulcan* thus involved an interpretation of one of the most complex provisions of the Act (secondary boycotts) whereas here it primarily involves interpretation of an express contract provision, which is the traditional grist of an arbitrator's opinion.

Petitioner makes the startling claim that enforcement of its own voluntary agreement to arbitrate, in some unexplained fashion, constitutes an impediment to its free access to the Board (Pet. Br., pp. 17-18).

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[5] The District Court also expressly rejected the same argument advanced by petitioners in that forum (App. 18a).

The claim flies in the face of the obvious fact that access to the Board by the Union has *not in any way been impeded* in this case. Petitioner's reliance on *NLRB* v. *Marine Workers,* 391 U.S. 418, to establish an impediment to its access to the Board is grossly inapposite. In that case, the Court ruled that a Union may not discipline a member under its own internal rules for filing a charge with the Board.[6]

In the present case, the only so-called "penalty" imposed on petitioner is that it adhere to its agreement to arbitrate. The "penalty" is thus not only self imposed, but in reality constituted no bar to the concurrent prosecution of the unfair labor practice charges before the NLRB. The court below correctly perceived that:

> "This argument is specious, for the court had nothing to do with the execution of the collective bargaining agreement in which the Union undertook to arbitrate. Where there is such an agreement there is concurrent contract and Board jurisdiction." (App. 6a)

And, as stated by the District Court, the end result of the Petitioner's restrictive construction of Section 301:

> "would mean that the Union, in its exclusive discretion could evade, at will, the contract arbitra-

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[6] The case cited by petitioner in its Supplemental Memorandum, *Association of Bakers and Drivers (Guy's Foods),* 188 NLRB No. 85 (1971), is merely an extension of the rule enunciated in *The Marine & Shipbuilding* case to the factual circumstance where a Union requires an employee to drop his unfair labor practice charge with the NLRB as the price for prosecuting his grievance under the contract. In both cases, a union-imposed penalty was exacted preventing access to the Board. The decision of the Court below in no way prevents access to Board processes.

> tion process by deliberately refraining from submitting the alleged grievance . . . and then filing its complaint with the Board." (App. 15a).

But, as stated at the outset, the long and short of it is that the petition runs squarely into *Warrior & Gulf* as well as the rule of concurrent jurisdiction as between the courts under Section 301 and the NLRB. The principle has been recently restated by this Court:

> ". . . [I]it has been made clear that in some circumstances the authority of the Board and the law of contract are overlapping, concurrent regimes, neither pre-empting the other." *NLRB* v. *Strong,* 393 U.S. 357, 360 (1969)

The "circumstances" to which this Court referred are situations when actions are both an alleged violation of contract, remedial under § 301, and simultaneously alleged unfair labor practices. See also *Carey* v. *Westinghouse,* 375 U.S. 261, 268-272 (1964); *Smith* v. *Evening News Association,* 371 U.S. 195, 196-197 (1962). Compare *NLRB* v. *C & C Plywood Corp.,* 385 U.S. 421, 426-428 (1967).

Petitioner's claim comes down to the transparent proposition that, once it has selected its favored forum, that choice is binding on the employer and recourse to the agreed-upon contract forum is cut off. Presumably, the argument is that the contract arbitration procedures are unenforceable because they permit the arbitrator to invade the province of the Board. But, as the court below held, this contention has long since been foreclosed by the decisions of this Court.

CONCLUSION

Since the present case involves no conflict with the decisions of this Court or with any decisions of the circuit courts, and is merely another judicial ruling favoring the arbitrability of a particular dispute under a particular collective bargaining agreement in complete harmony with this Court's Arbitration Trilogy, there is presented no important issue of Federal law which has not been, but should be, decided by this Court. Hence, the petition should be denied.

Respectfully submitted,

JOSEPH C. WELLS
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

GUY FARMER
Patterson, Belknap, Farmer & Shibley
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

Counsel for Respondent